APPEAL NO. 022274
FILED OCTOBER 17, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held on August 8, 2002, the hearing officer resolved the disputed issues by making certain findings of fact (one of which is appealed by the appellant/cross-respondent (claimant)), and by concluding that the claimant did not sustain a compensable injury in the form of a repetitive trauma injury, or otherwise, on _____ or _____, or on any other relevant date; that, pursuant to Texas Workers' Compensation Commission (Commission) Advisory 2002-08, the hearing officer should defer to the construction by the Texas Attorney General's Office of the Texas Supreme Court decision in Continental Casualty Company v. Downs, No. 00-1309; that the respondent/cross-appellant (carrier) did not waive the issue of its right to contest the compensability of the claimed injury under Section 409.021 because it contested the claimed injury within 60 days, though not within seven days; that the claimant did not waive his right to raise the carrier waiver issue (also referred to as the Downs waiver issue); and that the claimant has not had disability. The claimant has filed an appeal which challenges the finding that "[t]he evidence does not indicate that Claimant's condition is due to his work activities for Employer, rather than to Claimant's habit of sitting in a slouched position[,]" and further appeals the conclusions dispositive of the injury, carrier waiver, and disability issues. The carrier's response contends that the evidence sufficiently supports the challenged determinations. As regards the carrier waiver issue, the carrier urges that the holding in Downs should not be applied retroactively to this hearing; that the carrier relied on Commission rules in effect before the Downs decision became final on August 30, 2002, which prohibited the filing of Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms; and that even if the Downs decision is to be applied to this case, it does not affect the outcome because the hearing officer found that the claimant did not sustain an injury in the course and scope of employment and, thus, the carrier cannot waive into liability for a nonexistent injury. The carrier has filed a conditional appeal of the hearing officer's determination of the waiver issue to which the claimant has responded.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant testified that for approximately seven hours per day, five days per week, over the two-year period that he worked as a customer service representative, he sat at his workstation facing his computer and keyboard. He said that his repetitive activities on the job consisted of looking up and down at the monitor and keyboard and looking to the side to make sales notes on a piece of paper. The claimant further stated that after approximately two years of this work, in _____ he began to have stiffness and pain in his neck and upper back, and that on _____, he reported his neck and upper back complaints to a supervisor. There was no disputed

issue concerning the timeliness of his notice of injury to the employer. The claimant said that when he brought his complaints to the attention of the employer, the employer's ergonomics specialist visited his workstation and counseled him against continuing to sit in a slouched position in his chair, a position which, after an initial denial, he conceded was his usual sitting position, and to sit in a more upright and straight position. He further testified that he self-treated with Advil before commencing chiropractic treatment with Dr. V on March 8, 2001; that Dr. V had him off work through April 3, 2001; that he returned to full-duty work on April 4, 2001, and was given a different job; and that he was not paid for the time he was off work. The medical evidence reflected that an MRI done on April 25, 2001, revealed a disc bulge at the T7-8 level and that Dr. V's diagnoses included "muscle/capsular/ligament injury (acute or chronic) - cervical spine; displacement of cervical intervertebral disc without myelopathy; displacement of thoracic intervertebral disc without myelopathy; and cervical brachial neuritis or radiculitis." In his May 4, 2002, report, Dr. B, the carrier's peer review doctor who reviewed the claimant's medical records, opined that the claimant could have received a mild cervical and upper thoracic sprain/strain with associated muscle spasm which would have resolved in approximately eight weeks, that is, on or about April 20, 2001, and that the claimed mechanism of injury would not have caused the bulge at T7-8 which accounts for the claimant's current status.

We will discuss the Downs waiver issue first, as it is dispositive of several matters in this case. The parties stipulated that the "[c]arrier contested the claimed injury by contesting the injury within 60 days" and that "[t]here was not a contest or dispute of the claimed injury within 7 days." The hearing officer's findings reflect that he did not apply the Downs decision because of the Commission policy, in effect at that time, not to apply the Downs decision until the Texas Supreme Court's decision became final. *See* TWCC Advisory 2002-08, effective June 17, 2002. However, the Downs decision became final on August 30, 2002, and the Appeals Panel has since applied that decision when that issue has been before the Appeals Panel on appeal. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002; Texas Workers' Compensation Commission Appeal No. 021893, decided September 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002. *And see* TWCC Advisory 2002-15 (September 12, 2002) which provides that "All previous Advisories issued by the Commission regarding this issue are superceded by this Advisory and the Supreme Court decision." *Compare* Texas Workers' Compensation Commission Appeal No. 022113, decided October 3, 2002. Under the rationale of the Downs decision, the carrier did not comply with the provisions of Section 409.021(a) by either agreeing to initiate benefits or filing a notice of refusal within seven days. Thus the carrier has lost the right to contest compensability of the claimed injury. We reverse Conclusion of Law No. 5 and the portion of the Decision finding there was no carrier waiver, and render a new decision that the carrier waived the right to dispute the claimed injury and therefore the injury is compensable.

We part company from our dissenting brother on the question of the application of Continental Casualty Co. v. Williamson, 971 S.W. 2d 108, 110-111 (Tex. App.–Tyler

1998, no pet.h.) to the facts of this case. Judge O'Neill reads certain of the hearing officer's findings and conclusions as indicating that the claimant did not sustain an injury as such because the claimant's condition is nothing more than an ordinary disease of life, which does not qualify as an occupational disease under Section 401.011(34) because the hearing officer found that the condition was not due to the claimant's work activities. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury or disease, which was determined by the hearing officer not to have been causally related to the employment. See Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999, and Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, and the cases cited therein. In the case before us, as acknowledged by the hearing officer in the second Finding of Fact No. 3,[1] the claimant does have, based on the MRI report, "a disc bulge at the T7-8 interval of his spine, which is an injury that Claimant is claiming." The hearing officer also summarizes the March 22, 2002, letter from Dr. V which attributes the T7-8 disc bulge to the claimant's work activities, and provides some evidence of causation. There is, therefore, objective evidence of an injury, that is, damage or harm to the physical structure of the claimant's body. As such, the carrier was not relieved of its duty to contest compensability of the injury under Williamson, s*upra*. We reverse Conclusion of Law No. 3 and the portion of the Decision which states that the claimant did not sustain a compensable injury, and render a new decision that the injury became compensable as a matter of law pursuant to Section 409.021(a).

The hearing officer made an unchallenged factual finding that "[d]ue to the injury that Claimant is claiming, Claimant has been unable to obtain and retain employment at his preinjury wage from March 8, 2001 to April 3, 2001 and at no other time as of the date of the benefit contested case hearing." However, he determined that the claimant did not have disability based upon the determination that the claimant did not sustain a compensable injury. Given that we have reversed the hearing officer's injury determination and rendered a new decision that the claimant sustained a compensable injury as a matter of law under Section 409.021(a), we also reverse the determination that the claimant did not have disability and render a new determination that the claimant had disability from March 8 to April 3, 2001.

Turning to the issue of the claimant's having waived his right to raise the Downs waiver issue, the subject of the carrier's conditional appeal, the carrier contends that the hearing officer erred in allowing the claimant to add the Downs waiver issue to the statement of disputed issues because the claimant had not raised that issue at the benefit review conference (BRC). The claimant argued that on April 4, 2002, the date the BRC was held, there would not have been a Downs waiver issue to raise because the Texas Supreme Court did not affirm the decision of the San Antonio Court of Appeals in Downs until June 6, 2002. The claimant also noted that the BRC was held in Fort Worth and not in the jurisdictional area of the San Antonio court. The hearing officer, after hearing the parties' contentions, overruled the carrier's objection and

[1] There are two Findings of Fact numbered 3.

granted the claimant's motion to add the Downs waiver issue. We do not find that the hearing officer abused his discretion in finding good cause to grant the claimant's motion to add the Downs waiver issue as a disputed issue. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.7(e) (Rule 142.7(e)); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The hearing officer's decision is affirmed in part and reversed and rendered in part, as set out above.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I respectfully dissent and would affirm the hearing officer's determinations that the claimant did not sustain a compensable injury and did not have disability. I would also affirm the hearing officer's determination that the carrier did not waive its right to contest the compensability of the claimed injury, albeit on other grounds as set out below.

The majority have, apparently, affirmed the one finding appealed, namely, Finding of Fact No. 5, which states that the "[c]laimant's condition is due to his work activities for Employer, rather than to Claimant's habit of sitting in a slouched position." In his discussion of the evidence the hearing officer states that during the hearing, the claimant "sat with his bottom at the front edge of his seat and with his torso slumped against the back of the chair, in a semi reclining position, slouched in his chair" and that he "testified to the effect that this is how he customarily sits and that this is how he sat

at work during the relevant time period for which he is claiming an injury." Not appealed is Finding of Fact No. 4 which states that the claimant "sits in a slouched position when he is not at work, as evidenced by his sitting in a slouched position at the benefit contested case hearing and by his testimony to the effect that he customarily sits in a slouched position." These findings sufficiently support Conclusion of Law No. 3 which states that the claimant "did not sustain a compensable injury, in the form of a repetitive trauma injury, **or otherwise**, on _____, _____, or on any other relevant date. [Emphasis added.]"

Section 401.011(26) defines "injury" to include an occupational disease. Section 401.011(34) defines "occupational disease" as follows:

> Occupational disease means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

Plainly implicit in Findings of Fact Nos. 4 and 5, which support Conclusion of Law No. 3, is the hearing officer's finding that the claimant had an ordinary disease of life, namely, soreness and stiffness in his neck and upper back from constant slouching in his chair at work and elsewhere, and, perhaps, the disc bulge at T7-8, but not an "injury" as that term is defined in the 1989 Act. This is the position espoused by the carrier at the benefit review conference. In my opinion, the Downs decision is not applicable in this case because the hearing officer has found that the claimant did not sustain an injury. The court in Williamson, *supra*, stated that "an injury and a compensable injury are two different animals"; that while the insurance carrier in that case may have waived its right to contest the compensability of the claimed injury (left knee), it never waived its right to contest the injury itself; that the issue of the compensability of the claimed injury never arose because no injury was proven; and that a carrier's failure to contest the compensability of a claimed injury "cannot create an injury as a matter of law." I would affirm the hearing officer's determination that the claimant did not sustain an injury but rather an ordinary disease of life, which is not an "injury," and, thus, I would affirm the hearing officer's determination that the carrier did not waive its right to contest the compensability of the claimed injury.

_____
Philip F. O'Neill
Appeals Judge